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# A TORT IN SEARCH OF A REMEDY: PRYING OPEN THE COURTHOUSE DOORS FOR LEGAL MALPRACTICE VICTIMS

*Susan Saab Fortney\**

## INTRODUCTION

The rule of law and access to justice go hand in hand. International-law expert Professor Francesco Francioni describes the connection as follows:

In international law, as in any domestic legal system, respect and protection of human rights can be guaranteed only by the availability of effective judicial remedies. When a right is violated, access to justice is of fundamental importance for the injured individual and it is an essential component of the system of protection and enforcement of human rights.<sup>1</sup>

The Canadian Bar Association Access to Justice Committee takes a similar approach, explaining that justice “ensures fairness and equality for all, and respect for all who come before it. Being accorded respect from a justice system means being heard and provided with an effective, meaningful outcome.”<sup>2</sup>

Using this broad connotation of justice, this Article questions whether many victims of legal malpractice<sup>3</sup> are denied access to justice. In writing

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1. Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, in *ACCESS TO JUSTICE AS A HUMAN RIGHT 1* (Francesco Francioni ed., 2007).

2. ACCESS TO JUSTICE COMM., CANADIAN BAR ASS’N, REACHING EQUAL JUSTICE REPORT: AN INVITATION TO ENVISION AND ACT 62 (2013), [http://www.cba.org/CBAMediaLibrary/cba\\_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf) [https://perma.cc/9V8M-8JUS]. This definition illustrates how authors around the world take a comprehensive view when discussing access to justice. In the United States, the term “access to justice” often refers to access to affordable legal services. See, e.g., *Access to Justice*, U.S. DEP’T JUST., <https://www.justice.gov/atj> (last visited Mar. 25, 2017) [https://perma.cc/MN4P-R5GC]. In discussing access to justice, this Article takes the more inclusive global position on the term “access to justice.”

3. This Article uses “legal malpractice” as an umbrella term to cover a range of professional liability claims against attorneys, including claims based on negligence, breach of fiduciary duty, and intentional torts. See SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* 19 (2d ed. 2015).

about the regulatory function of legal malpractice as a tort, Professor John Leubsdorf argues that legal malpractice relates to three important functions of the law of lawyering: “[D]elineating the duties of lawyers, creating appropriate incentives and disincentives for lawyers in their dealings with clients and others, and providing access to remedies for those injured by improper lawyer behavior.”<sup>4</sup> Arguably, persons injured by lawyer misconduct are denied access to justice if our civil liability system does not provide them access to meaningful redress.

The economics and common law rules relating to legal malpractice claims present significant challenges for persons injured by lawyers’ acts or omissions. Both scholars and practitioners have examined the obstacles that a legal malpractice plaintiff must overcome. For example, a number of plaintiffs’ attorneys have posted online commentaries discussing the practical problems malpractice plaintiffs face, as well as the dynamics and legal principles that impede their ability to prevail and to collect judgments and settlements.<sup>5</sup> In addition, various scholars have published articles examining specific issues that make it difficult for plaintiffs to recover in legal malpractice cases.<sup>6</sup> Notably, Professors Lawrence W. Kessler and Benjamin Barton provide context for why and how the legal system favors lawyers in legal malpractice cases. In his 2002 article, Professor Kessler thoughtfully examines how the dynamic of “capture” explains why certain liability doctrines have not been incorporated into the tort of legal malpractice, preventing those injured by negligent legal services from obtaining compensation.<sup>7</sup> He argues that lawyers who regulate the bar, through their roles as judges, legislators, and advocates, have had their neutrality undermined by overidentification with the legal profession.<sup>8</sup> As a result, he maintains that the “legal malpractice tort, alone, retains defendant protections that have been denied to others.”<sup>9</sup> To support his argument, Professor Kessler examines in depth two discrete malpractice rules that

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4. John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 105 (1995).

5. See, e.g., Howard Altschuler, *Legal Malpractice Litigation: Some of What You Need to Know BEFORE You Decide Whether to Sue Your Lawyer*, LEGAL MALPRACTICE L. CTR. (July 31, 2013), <http://legal-malpractice.com/legal-malpractice-litigation-some-of-what-you-need-to-know-before-you-decide-whether-to-sue-your-lawyer/> [https://perma.cc/VVM2-3V4T]; *What Are the Typical Hurdles in a Legal Malpractice Case?*, NOWAK & STAUCH, <http://www.ns-law.net/Practice-Areas/Legal-Malpractice/What-are-the-typical-hurdles-in-a-legal-malpractice-case.shtml> (last visited Mar. 25, 2017) [https://perma.cc/26TE-NBNL].

6. See Daniel B. Meyer & Edward C. Eberspacher, *My Negligence?: What About Yours?: Legal Malpractice and a Client’s Comparative Fault*, FOR DEF., Oct. 2007, at 18. See generally Michael P. Cross & Nicole M. Quintana, *Your Place or Mine?: The Burden of Proving Collectability of an Underlying Judgment in a Legal Malpractice Action*, 91 DENV. U. L. REV. 53 (2014).

7. Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the “Captured” Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 457–58 (2002). “Capture is a term developed in the early part of the last century to explain the dynamic through which regulatory agencies often failed to zealously restrict the industries that they were supposed to regulate.” *Id.* at 458.

8. *Id.* at 466.

9. *Id.* at 457.

favor lawyers.<sup>10</sup> He concludes by advocating that the rules be modified “to make the legal malpractice tort a viable mechanism for protecting the purchasers of legal services.”<sup>11</sup>

Professor Barton also questions the close relationship between the regulated bar and the judiciary.<sup>12</sup> In his seminal piece on judicial bias, he proposes the following lawyer-judge hypothesis:

[M]any legal outcomes can be explained, and future cases predicted, by asking a very simple question: is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession.<sup>13</sup>

To support his hypothesis, Barton uses a number of examples, including a handful of rules in legal malpractice cases that favor lawyer-defendants.<sup>14</sup>

Both Professors Barton and Kessler point to the value of exposing the prolawyer phenomenon, suggesting that shedding light on judicial bias may be “enough to shift the law in some of these areas.”<sup>15</sup> As Professor Barton states, “Perhaps pointing out the cumulative effects of these unconscious decisions [that favor lawyers] will lead to some reforms.”<sup>16</sup> Professor Kessler makes a similar observation, noting that the solution to capture is education.<sup>17</sup>

In that same educational spirit, this Article takes a systematic approach to examining the obstacles encountered when injured persons seek compensation for injuries suffered at the hands of lawyers. Part I examines the numerous hurdles that an injured person must surmount when commencing a legal malpractice action. Assuming that an injured person overcomes those obstacles, Part II reviews the difficulties that malpractice plaintiffs encounter in pursuing their claims, including the various rules and doctrines that favor legal malpractice defendants. Even after a plaintiff obtains a judgment, Part III considers the obstacles that plaintiffs encounter in actually collecting on that judgment. In an attempt to better balance the public’s interest in holding lawyers accountable with the lawyer-

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10. *See id.* at 477–91 (analyzing how malpractice defendants are favored by rules related to the compensability of emotional harm and deduction of certain attorney’s fees from a malpractice verdict).

11. *Id.* at 499.

12. *See generally* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453 (2008).

13. *Id.* at 454.

14. *See id.* at 492–502 (discussing how the law favors defendants in legal malpractice cases compared to defendants in medical malpractice cases). In this examination, Professor Barton focuses on requirements for proving causation and establishing privity in legal malpractice cases. *See id.*

15. *Id.* at 503 (explaining that some or all of the effects are the result of unconscious judicial bias toward their own experiences and naturally increased empathy for litigants who share similar backgrounds and experiences).

16. *Id.*

17. Kessler, *supra* note 7, at 499. Although capture may not be eliminated, Professor Kessler suggests that “a judiciary that is aware of its biases can control them.” *Id.*

defendant's interest in having the law not impose unfair burdens,<sup>18</sup> Part IV proposes specific changes and suggests that attorneys and judges should recognize the link between financial accountability and professionalism by supporting reforms to provide access to justice to consumers injured by lawyer misconduct.

### I. CHALLENGES IN COMMENCING A LEGAL MALPRACTICE LAWSUIT

Before embarking on a legal action against a lawyer, a prospective plaintiff must, of course, recognize that she has a potential malpractice claim. Due to the nature of the attorney-client relationship, however, injured persons may be completely unaware that the attorney has engaged in misconduct. From the outset of the representation, most inexperienced users of legal services largely lack information to judge their lawyers' conduct.<sup>19</sup> Due to the information disparities between lawyers and their clients, market principles do not apply to the attorney-client relationship,<sup>20</sup> potentially impacting the ability of clients to control their representation and to judge their lawyers' performance.<sup>21</sup> Without adequate information, clients may be forced to rely on their lawyers' explanations of the outcomes of representation, unaware of the fact that they were victims of legal malpractice.<sup>22</sup>

Clients might not be left in the dark if more lawyers recognized that ethical rules and fiduciary principles impose duties on them to disclose their own malpractice to their clients. Despite the fact that experts maintain that the duty to disclose one's own malpractice is "well-grounded" in the American Bar Association (ABA) Model Rules of Professional Conduct

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18. Professor Vincent R. Johnson makes this point in the following introduction to legal malpractice rules:

In some cases, these rules work to hold lawyers accountable for harm to persons resulting from errant practices. In other cases, the relevant principles insulate lawyers from damage awards when it would be unfair to impose legal responsibility. Thus, legal malpractice law attempts to strike a fair balance between the public's interest in consumer protection and the legal profession's need for freedom of action.

VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 1 (2011).

19. See Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 494 (2011) ("Clients come to lawyers to find out what the law requires, prohibits, or allows them to do.").

20. See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 90 (1979) ("The information disparities between lawyer and client negate the usual market assumption that, at the beginning of a transaction, the buyer can tell the seller exactly what he wants and thereby 'control' the seller.").

21. See *id.* at 104 (suggesting that the clients are better prepared to monitor their counsel when they receive reliable information and give their informed consent).

22. See generally Benjamin P. Cooper, *Attorney Self-Disclosure*, 79 U. CIN. L. REV. 697 (2010) (discussing information gaps and the theoretical, moral, and public policy justifications for requiring lawyers to disclose lawyer-specific information, and proposing an amendment to the rules of professional conduct that would require more disclosure).

and supported by fiduciary law,<sup>23</sup> there is a “dearth of direct authority requiring self-reporting.”<sup>24</sup> In discussing lawyers’ failure to honor this professional and fiduciary duty, Professor Benjamin P. Cooper provides the following explanations:

The lawyer may not believe he or his firm has committed malpractice or may otherwise be unaware that he or his firm has committed an act of malpractice. He may be unaware of his duty to report his malpractice. He may want to try to fix the error. A more sinister explanation is that the lawyer has decided to intentionally hide his mistake from his client.<sup>25</sup>

Lawyers may be more inclined to disclose their own malpractice if more courts recognized an independent cause of action for lawyers’ failure to self-report. Around the United States, reported decisions are split on the ability of a client to maintain such a separate claim.<sup>26</sup> Until the majority of courts recognize a separate cause of action for failure to self-report,<sup>27</sup> many lawyers may continue to take an ostrich approach to disclosing their own malpractice to clients. As a result, clients may be wholly unaware of the basis for a potential legal malpractice claim.

Developments related to in-firm communications also affect the ability of clients to learn information pertinent to ethics and malpractice concerns. Starting in the late 1980s, courts began to address the application of the attorney-client privilege to internal firm communications between the firm’s designated in-house counsel and other firm personnel.<sup>28</sup> Early cases that addressed this in-firm privilege refused to shield certain communications, applying what is referred to as “current-client” or “fiduciary” exceptions to the attorney-client privilege.<sup>29</sup> In response to those opinions, the organized bar pushed for a broader recognition of the in-firm privilege. In 2013, the House of Delegates of the ABA adopted a resolution urging all judicial and other governmental bodies to recognize the in-firm privilege and not subject it to fiduciary or current-client exceptions.<sup>30</sup> Now, the tide has shifted with

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23. Benjamin P. Cooper, *The Lawyer’s Duty to Inform His Client of His Own Malpractice*, 61 BAYLOR L. REV. 174, 182–88 (2009); see also MODEL RULES OF PROF’L CONDUCT *ET AL.* 1.4, 1.7 (AM. BAR ASS’N 2016).

24. Cooper, *supra* note 23, at 182.

25. Benjamin P. Cooper, *When Clients Sue Their Lawyers for Failing to Report Their Own Malpractice*, 44 HOFSTRA L. REV. 441, 448–49 (2015).

26. See *id.* at 448 (noting that there have been “surprisingly few reported cases in which a client has attempted to assert a separate claim against the lawyer based on the lawyer’s failure to report his own malpractice”).

27. See *id.* at 470 (arguing that clients should be able to assert an independent claim for breach of fiduciary duty and seek equitable remedies such as fee forfeiture).

28. For the seminal article that advocates for the recognition of a broad privilege, see Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721 (2005).

29. See Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves?: An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS, 271, 297–300 (1996) (analyzing the first cases that extended the privilege to some communications but limited the protection with respect to communications involving current clients).

30. Tort Trial & Ins. Practice Section, Am. Bar Ass’n, *Report to the House of Delegates: Resolution 103*, in AMERICAN BAR ASSOCIATION 2013 ANNUAL MEETING: RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES 133 (2013), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/2013\\_hod\\_annual\\_resolutionswithrepo](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_hod_annual_resolutionswithrepo)

more reported opinions allowing firms to shield communications between in-firm counsel and firm personnel when communications were made for the purpose of facilitating the rendition of professional services to the law firm.<sup>31</sup> Various commentaries treat the expanded recognition of the privilege as favorable.<sup>32</sup> Although the trend may benefit firms that want to shield information from clients, it hurts clients who are unaware of possible conflicts of interest and other material information impacting the representation.<sup>33</sup> Rather than encouraging lawyers to disclose their malpractice, recognition of a broad privilege may encourage lawyers to circle the wagons and shield their communications from current clients. As a result, it may be harder for current clients to discover communications related to malpractice committed by their lawyer-fiduciaries.<sup>34</sup>

Even when injured persons are aware of a potential legal malpractice claim, they face the hurdle of finding an experienced lawyer to pursue it. Webpages of a number of legal malpractice plaintiffs' attorneys describe the difficulties that plaintiffs will encounter in suing attorneys. Unlike other plaintiffs' attorneys who paint bright pictures of possible recovery, both the titles and content of these pieces warn prospective clients about the hurdles to overcome in legal malpractice cases.<sup>35</sup> These online commentaries describe the range of dilemmas facing legal malpractice plaintiffs, starting with the first step of hiring a competent malpractice lawyer to handle the matter.

For decades, prospective malpractice plaintiffs faced a "conspiracy of silence," meaning that as a matter of professional courtesy lawyers did not

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rts.authcheckdam.pdf [https://perma.cc/TTZ7-NKDF]. "Supporters of the ABA's position argue that internal ethical conversations should be privileged, to encourage lawyers to seek ethical advice." Bruce Rubin & KC Harding, *In-House Attorney-Client Privilege in the Wake of Crimson Trace*, A.B.A. (Aug. 12, 2014), <http://apps.americanbar.org/litigation/committees/corporate/articles/summer2014-0814-in-house-attorney-client-privilege-wake-crimson-trace.html> [https://perma.cc/75GR-D4M9].

31. For an overview of the case developments, see Glen R. Olson et al., *Ethics and Internal Firm Communications Regarding Lawyer Malpractice Claims*, 45 BRIEF 52 (2016).

32. See, e.g., Karen Rubin, *Firm Counsel Privilege Prevails; New York Joins Favorable Trend in Recognizing Doctrine*, LAW FOR LAW. TODAY (July 14, 2016), <http://www.thelawforlawyerstoday.com/2016/07/2676/> [https://perma.cc/WZS9-VZGL]. On June 30, 2016, a New York state appellate court joined other courts in recognizing that the in-firm privilege applies to communications between law firm attorneys and the firm's in-house general counsel, even when the communications related to a current client. See *Stock v. Schnader Harrison Segal & Lewis LLP*, 35 N.Y.S.3d 31, 33 (App. Div. 2016).

33. The Association of Corporate Counsel filed an amicus brief in *Crimson Trace Corp. v. Davis Write Tremaine LLP*, 326 P.3d 1181 (Or. 2014), arguing that the application of attorney-client privilege to in-firm communications would corrode trust between in-house corporate counsel and outside counsel and would "lead clients to hesitate to seek outside legal advice." Brief of Amicus Curiae Ass'n of Corp. Counsel in Support of Plaintiff-Adverse Party Crimson Trace Corp. at 3, *Crimson Trace*, 326 P.3d 1181 (No. S061086), 2013 WL 5958906, at \*3; see also Rubin & Harding, *supra* note 30.

34. In many states, the existence of an ongoing attorney-client relationship will toll the statute of limitations. See FORTNEY & JOHNSON, *supra* note 3, at 332-34 (discussing the "continuous representation" rule).

35. See, e.g., Altschuler, *supra* note 5; *What Are the Typical Hurdles in a Legal Malpractice Case?*, *supra* note 5.

criticize, sue, or testify against other lawyers.<sup>36</sup> Although more lawyers are now willing to pursue legal malpractice claims, prospective plaintiffs in various circles and communities may still encounter resistance. Some lawyers are unwilling to represent plaintiffs, believing, “There but for the grace of God go I.”<sup>37</sup> Others may resist taking a case that has the prospect of increasing malpractice exposure for all lawyers.

Persons who succeed in locating a lawyer willing to pursue a malpractice case must still carefully screen the lawyer to determine if the lawyer has the requisite expertise to handle the matter. “Understanding what constitutes malpractice and figuring what to do next is a complicated procedure, especially when you are dealing with the repercussions of a failed legal case.”<sup>38</sup>

The likelihood of retaining a lawyer with the necessary expertise to handle a legal malpractice case will largely turn on the economics of the representation. “Legal malpractice cases are particularly difficult and expensive,” partly because lawyers become formidable opponents when they believe that their assets and reputations are threatened.<sup>39</sup> Thus, either the prospective client must possess the means to fund the litigation, or the underlying case must have significant value to support a malpractice attorney handling the litigation on a contingent fee basis.<sup>40</sup> Although contingency fee decisions will depend on the particular facts of the representation, plaintiffs’ attorneys may require a minimum amount of damages, such as \$300,000, before the attorney agrees to a contingency fee.<sup>41</sup>

Plaintiffs’ legal malpractice attorneys are also “rare” because these types of professional liability cases generally promise a lower return on the attorney’s efforts than other types of cases.<sup>42</sup> This is due to both the

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36. FORTNEY & JOHNSON, *supra* note 3, at 10; see Gary N. Schumann & Scott H. Relihy, *The Impending Wave of Legal Malpractice Litigation: Predictions, Analysis, and Proposals for Change*, 30 ST. MARY’S L.J. 143, 176–77 (1998) (noting that lawyers’ reluctance to sue one another “was much greater fifty or even twenty-five years ago”).

37. *John Bradford*, OXFORD DICTIONARY OF QUOTATIONS (Elizabeth Knowles ed., 5th ed. 1999).

38. *Tips on Suing Your Lawyer for Malpractice*, MAKAREM & ASSOCS. (Feb. 28, 2015), <http://www.makaremlaw.com/tips-suing-lawyer-malpractice/> [https://perma.cc/PAT8-8WSC].

39. *Suing an Attorney for Malpractice Is Harder Than You Think*, I DO NOT WANT TO BE YOUR LAW. (Aug. 26, 2013), <http://www.idonotwanttobeyourlawyer.com/suing-an-attorney-for-malpractice-is-harder-than-you-think/> [https://perma.cc/328U-TP64].

40. One law firm that only handles legal malpractice claims resulting from personal injury cases notes that the firm will have to determine that the underlying case had “significant value” before deciding to take it on. *Legal Malpractice*, LAW FIRM REED & MANSFIELD, <http://www.accidentawardslasvegas.com/additional-services/legal-malpractice-lawyers/> (last visited Mar. 25, 2017) [https://perma.cc/U7BT-SW44].

41. In a book written for lay people, one malpractice expert dissuaded clients from agreeing to pay attorneys on an hourly basis unless clients believe that they “have an outstanding case with a potential recovery in the millions and [the clients] have substantial financial resources.” BOYD S. LEMON, *EVALUATING A MALPRACTICE CASE AGAINST A LAWYER* 23 (2006).

42. *Suing an Attorney for Malpractice Is Harder Than You Think*, *supra* note 39.



complexity and the higher costs of trying a legal malpractice case.<sup>43</sup> “For these simple reasons, only the most promising of legal malpractice cases will be considered by the few lawyers willing to practice in this area.”<sup>44</sup>

The use of expert testimony contributes to both the cost and complexity of legal malpractice cases.<sup>45</sup> Under a “‘widely followed rule,’ the plaintiff ‘in a legal malpractice action . . . must present expert testimony establishing the standard of care unless the attorney’s lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge.’”<sup>46</sup> The role of the expert is to assist the fact-finder in understanding the standard of care applicable to the lawyer-defendant’s conduct.

To be able to provide such testimony, experts commonly devote many hours to reviewing case material, conducting research, preparing reports or affidavits, and preparing to testify.<sup>47</sup> Experts typically bill on an hourly basis because the common law rules in most jurisdictions prohibit lawyers from paying an expert on a contingent fee basis.<sup>48</sup> This makes hiring experts an expensive proposition.<sup>49</sup>

Understanding that hiring experts can be expensive, experienced plaintiffs’ attorneys consider expert fees when evaluating the economics of pursuing a legal malpractice claim.<sup>50</sup> The expense of hiring experts may weigh heavily in a plaintiffs’ attorney’s decision to decline handling a claim when the amount of recovery would not cover litigation costs. In many cases, the cost of the expert alone may prevent a plaintiff from finding a lawyer who will take the case on a contingency fee basis.<sup>51</sup>

Assuming a plaintiffs’ attorney determines that the amount of damages would support hiring an expert, the next hurdle is finding the “right” expert.

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43. *Id.*

44. *Id.*

45. According to one legal malpractice specialist, “One of the reasons why legal malpractice cases are generally complex is because a client suing a lawyer needs to hire at least two lawyers, the one to bring the suit, and another lawyer from another firm to be the expert.” Howard Altschuler, *You Have a Legal Malpractice Expert?: Great . . . but That’s Still NOT Good Enough* . . . , LEGAL MALPRACTICE L. CTR. (Aug. 27, 2014), <http://legal-malpractice.com/legal-malpractice-expert-great-thats-still-good-enough> [<https://perma.cc/QQ9U-BQP9>].

46. FORTNEY & JOHNSON, *supra* note 3, at 77 (quoting *Television Capital Corp. of Mobile v. Paxson Commc’ns Corp.*, 894 A.2d 461, 469 (D.C. 2006)).

47. See JOHNSON, *supra* note 18, at 74–75.

48. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117 cmt. c (AM. LAW INST. 2000) (“A fee paid an expert witness may not be contingent on the content of the witness’s testimony or the result in the litigation.”); see also MODEL RULES OF PROF’L CONDUCT r. 1.5 cmt. 3 (AM. BAR ASS’N 2016).

49. See JOHNSON, *supra* note 18, at 74–75 (reviewing the duties and compensation of experts in legal malpractice cases).

50. *Id.* at 75.

51. Of course, a plaintiffs’ attorney wants to avoid liability for the cost of hiring experts. Unless the lawyer disclaims liability at the time of contracting, a lawyer is liable for the compensation of an expert whom the lawyer has hired when the expert provides services used by the lawyer and the lawyer knows or reasonably should know that the expert relies on the lawyer’s credit. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 30(2)(b) cmt. b.

The selection and use of qualified experts can make or break a legal malpractice claim. Thus, a threshold concern in commencing a legal malpractice case is for the plaintiff to find an experienced legal malpractice attorney who understands the importance of retaining a qualified and credible expert. Recognizing the specialized knowledge that an attorney needs to competently handle a legal malpractice case, two experienced plaintiffs' attorneys warned that "counsel desiring to represent clients who wish to sue their former lawyers ought to be extremely careful, lest the prosecutor become the prosecuted."<sup>52</sup>

## II. CHALLENGES IN TRYING LEGAL MALPRACTICE CLAIMS

As discussed in Part I, a plaintiff's ability to successfully sue her lawyer largely depends on hiring an attorney who is experienced in handling legal malpractice cases. Once retained, plaintiffs' attorneys must be prepared to deal with numerous challenges faced by plaintiffs in legal malpractice cases. This part surveys those difficulties, starting with the selection of theories of liability to assert.

### A. Selection of Theories of Liability

In commencing a lawsuit, the first step for the plaintiff's counsel is to articulate the causes of action that can be established by a preponderance of the evidence. When a plaintiff is suing an attorney, this determination can be tricky because "courts . . . are not in agreement on the exact nature of and parameters for" the different professional liability claims against attorneys.<sup>53</sup> Some courts use the term "legal malpractice" to refer only to negligence claims.<sup>54</sup> Others take the approach used in this Article, using the term as an umbrella reference covering different causes of action, including negligence and breach of fiduciary duty.<sup>55</sup>

A plaintiffs' attorney must differentiate the theories of liability available in the particular jurisdiction. This is no easy feat because the case law across jurisdictions is perplexing and inconsistent.<sup>56</sup> For instance, while some courts allow claims when the operative facts supporting the breach of fiduciary duty and negligence claims are the same, others refuse to do so.<sup>57</sup> This creates both confusion and uncertainty even for the most experienced plaintiffs' attorney who seeks to pursue separate breach of fiduciary duty and negligence claims.

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52. Neil J. Dilloff & Albert S. Barr III, *Legal Malpractice: The Plaintiff's Perspective*, 18 MD. B.J. 6, 8 (1983).

53. Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 45 SMU L. REV. 235, 235 (1994).

54. See FORTNEY & JOHNSON, *supra* note 3, at 19 (explaining that "legal malpractice" traditionally referred to professional negligence claims against lawyers).

55. See *id.* ("Over the years, courts and commentators have taken a more expansive view of legal malpractice, using the term to refer to various claims against lawyers.")

56. See Cooper, *supra* note 25, at 457-58 (referring to the "incoherent doctrine" related to breach of fiduciary duty and negligence claims).

57. See *id.* at 458.

When possible, a plaintiff should attempt to differentiate liability theories by pleading claims separately, marshaling evidence, and obtaining separate findings on each cause of action. An assessment of malpractice cases reveals how plaintiffs may face dismissal of claims that courts deem to be duplicative. For example, in *Axcess International, Inc. v. Baker Botts, L.L.P.*,<sup>58</sup> the plaintiff asserted a breach of fiduciary duty claim and a negligence claim.<sup>59</sup> The jury charge only included a negligence claim because the judge had dismissed the breach of fiduciary duty claim.<sup>60</sup> The jury awarded the plaintiff \$40.5 million on the negligence claim;<sup>61</sup> however, the jury also concluded that the plaintiff should have discovered the negligence more than two years before the negligence claim was brought.<sup>62</sup> Thus, recovery on the negligence claim was barred by the applicable two-year statute of limitations.<sup>63</sup> Had the plaintiff convinced the trial court that the breach of fiduciary duty claim was supported by evidence and not duplicative, the plaintiff might have secured a multimillion dollar judgment. As the case illustrates, plaintiffs face real difficulties in pleading and proving different causes of action on which judgments can be obtained and sustained.

### B. Establishing the Elements of a Negligence Claim Generally

In a legal malpractice case based on negligence, the plaintiff carries the burden of establishing duty, breach, causation, and damages by a preponderance of the evidence.<sup>64</sup> Because various defendant-friendly protections exist in legal malpractice law, it is very difficult for many plaintiffs to carry the burden of proving each element of a negligence claim.<sup>65</sup>

Starting with duty, the first element of a negligence claim, a plaintiff must establish that the defendant owed a duty of care to the plaintiff. Lawyers clearly owe a duty of care to their clients; however, duties owed to prospective clients and nonclients are far more limited.<sup>66</sup> “Traditionally, nonclients found lack of privity to be a serious obstacle to bringing claims

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58. No. 05-14-01151-CV, 2016 WL 1162208 (Tex. App. Mar. 24, 2016).

59. *Id.* at \*3; see Jess Krochtengel, *Baker Botts Dodges \$41M Verdict in IP Malpractice Trial*, LAW360 (May 15, 2014, 12:51 PM), <http://www.law360.com/articles/537619/baker-botts-dodges-41m-verdict-in-ip-malpractice-trial> [<https://perma.cc/4H4B-85EE>].

60. *Axcess Int'l*, 2016 WL 1162208, at \*1; see Krochtengel, *supra* note 59.

61. See Krochtengel, *supra* note 59.

62. *Axcess Int'l*, 2016 WL 1162208, at \*1.

63. *Id.*

64. See FORTNEY & JOHNSON, *supra* note 3, at 45.

65. Compare Kessler, *supra* note 7, at 457 (asserting that the “legal malpractice tort, alone, retains defendant protections that have been denied to others,” such as defendants in medical malpractice and products liability cases), with Barton, *supra* note 12, at 491 (“It is much harder to prove legal malpractice than medical malpractice . . . because the legal profession has enjoyed several unique advantages as defendants in malpractice actions, and doctrinal changes that have applied in medical malpractice have been barred or adopted much more slowly in legal malpractice [actions].”).

66. See FORTNEY & JOHNSON, *supra* note 3, at 34–35, 47–52 (discussing how the plaintiff’s relationship with the attorney-defendant affects standing and the ability to pursue different types of claims).

against lawyers who did not represent them.”<sup>67</sup> Although various courts have eroded the privity requirement, some states continue to adhere to a strict privity rule.<sup>68</sup> Even in states that allow certain types of third-party claims, the tests for third-party liability make it very difficult for nonclients to sue attorneys.<sup>69</sup> In addition, some states have adopted statutory limits on attorneys’ liability to nonclients.<sup>70</sup>

Next, the plaintiff must tackle the second element of the negligence claim: breach. As noted above, a plaintiff generally must present expert testimony related to the breach of the standard of care.<sup>71</sup> From the perspective of a plaintiff seeking damages of less than six figures, the expert requirement may make the case economically infeasible to pursue.<sup>72</sup>

The economics of a legal malpractice case and the availability of legal malpractice as a remedy could completely change in some cases if a plaintiff could rely on negligence per se doctrine and pursue a negligence claim based on the defendant’s violation of applicable disciplinary rules.<sup>73</sup> Unfortunately, from the standpoint of a plaintiff, such an effort will be unsuccessful because of language included in the preface to the applicable disciplinary rules. Specifically, the Model Rules of Professional Conduct and the state versions of those rules expressly provide that the disciplinary rules do not define standards of civil liability for professional conduct.<sup>74</sup> Despite the criticism of this language as being “self-serving economic protectionism, drafted by the organized bar,” courts continue to point to this language.<sup>75</sup> This language effectively guts a plaintiff’s ability to rely on negligence per se.<sup>76</sup>

### C. Proving Causation with a Trial Within a Trial

Although the duty and breach elements present hurdles for legal malpractice plaintiffs, proving causation may be the most complex aspect of

67. *Id.* at 180.

68. See Tom W. Bell, *Limits on the Privity and Assignment of Legal Malpractice Claims*, 59 U. CHI. L. REV. 1533, 1535–36 (1992).

69. See Barton, *supra* note 12, at 498.

70. *E.g.*, ARK. CODE ANN. § 16-22-310 (2016) (stating that licensed attorneys shall not be liable to persons not in privity, subject to limited exceptions).

71. See *supra* note 46 and accompanying text.

72. See *supra* note 49 and accompanying text.

73. With negligence per se, the unexcused violation of a standard-setting legislative enactment is conclusive proof of breach of duty. See FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 17.6 (3d ed. 2007).

74. MODEL RULES OF PROF’L CONDUCT pmbl. (AM. BAR ASS’N 2016) (noting that a violation of a rule “should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached”).

75. See Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 82–83 (1998) (arguing that violations of the ethics rules should raise an inference of negligence, rather than a presumption of negligence or negligence per se).

76. Although a minority of courts have found that an ethical violation creates a rebuttable presumption of legal malpractice, the majority uses the approach reflected in the Restatement of the Law Governing Lawyers, which treats violations of ethics rules as evidence of professional misconduct. See FORTNEY & JOHNSON, *supra* note 3, at 36–37.

a legal malpractice claim. Regardless of whether the alleged malpractice arose out of civil or criminal representation, the plaintiff must prove both factual and legal causation.<sup>77</sup>

### 1. Civil Litigation

To establish factual causation where the underlying representation involves a civil matter, the malpractice plaintiff must prove by a preponderance of the evidence that “but for” the lawyer-defendant’s misconduct, the harm would not have occurred and the plaintiff would have obtained a more favorable judgment.<sup>78</sup> This often means, however, that there must be a “trial within a trial” in which all of the “issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff’s former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action.”<sup>79</sup> Over twenty-five years ago, Professor Joseph Koffler asserted that this alignment of burdens is “not consistent with common law principles as it is not an adversarial proceeding between the real parties in interest in the underlying action.”<sup>80</sup>

### 2. Settlements

One causation twist relates to the application of the trial-within-a-trial requirement when a plaintiff settled the underlying civil action, allegedly relying on the lawyer’s advice. These so-called “settle-and-sue” cases should fit within the trial-within-a-trial framework as follows:

The settling client should have to prove not just that he would have won the underlying case, but that he also would have recovered more than the amount of the settlement in that trial. The difference between the theoretical recovery in the underlying case and the settlement would constitute the client’s damages.<sup>81</sup>

Although many courts have allowed settle-and-sue claims to go forward, others have rejected them, largely treating the claims as speculative.<sup>82</sup> A few courts have determined that allowing plaintiffs to sue their lawyers after experiencing settlor’s remorse would violate strong public policy that encourages settlements.<sup>83</sup> From the perspective of plaintiffs, those courts

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77. *See id.* at 101–02.

78. *See id.* at 102–03 (suggesting that a defendant may be able to escape liability by convincing the trier of fact that the plaintiff’s harm was caused by something other than the defendant’s negligence).

79. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. b (AM. LAW INST. 2000).

80. Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial: A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40, 41 (1989).

81. Michael L. O’Donnell & Christopher P. Montville, *New Strategies for Defending Professional Liability Claims*, in BEST PRACTICES FOR ADDRESSING PROFESSIONAL LIABILITY CLAIMS 35, 41 (2015).

82. *See id.* at 42 & n.11.

83. *See Muhammad v. Strassburger*, 587 A.2d 1346, 1348 (Pa. 1991). In resolving the case in light of the “longstanding public policy” that encourages settlements, the

that reject the settle-and-sue claims effectively immunize lawyers from civil liability for claims arising out of settlements.<sup>84</sup> Even in jurisdictions that allow malpractice claims arising out of settlements, plaintiffs' attorneys may decline to handle these cases because they feel like winning that kind of malpractice claim is too difficult.<sup>85</sup>

### 3. Transactional Matters

When the alleged misconduct arose in connection with an attorney's handling of transactional matters, courts require the plaintiff to demonstrate that an underlying position was compromised or negatively impacted due to the negligence of the lawyer-defendant.<sup>86</sup> Although transactional representation does not involve an underlying case, the term "trial within a trial" may still be used to describe the plaintiff's burden to demonstrate that the attorney compromised a meritorious underlying position.<sup>87</sup> When the underlying transaction was complex, it tends to be a herculean feat for the plaintiff to satisfy its burden without confusing the jury.

### 4. Criminal Cases

The application of causation principles also provides a great deal of protection to criminal defense attorneys. Notwithstanding that a plaintiff may be able to establish unequivocally that the defense attorney's conduct fell below the applicable standard of care, the criminal defendant must prove more than the trial within a trial: in the great majority of jurisdictions, criminal defendants must either obtain postconviction relief or prove that they were actually innocent.<sup>88</sup> Although courts use different approaches, a legal malpractice plaintiff's unlawful conduct generally shields lawyer-defendants from liability for their misconduct.<sup>89</sup>

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Pennsylvania Supreme Court concluded, "Simply stated, we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action." *Id.* at 1348. *But see* Thomas v. Bethea, 718 A.2d 1187, 1193 (Md. 1998) (noting that the *Muhammad* decision represents a "distinct minority view").

84. In repudiating authority that limits the ability of a plaintiff to sue following settlement, the New Jersey Supreme Court explained:

Although we encourage settlements, we recognize that litigants rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks.

*Ziegelheim v. Apollo*, 607 A.2d 1298, 1304 (N.J. 1992).

85. *See, e.g., Legal Malpractice, supra* note 40 (explaining why the firm declines to handle postsettlement legal malpractice cases).

86. *See* John M. Palmeri & Franz Hardy, *Application of the "Case Within a Case" Standard*, FOR DEF., Mar. 2008, at 48–49 (noting that the majority of courts have applied the case-within-a-case standard to transactional malpractice claims).

87. *See id.* at 49.

88. *See* Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 63–64, 64 nn.131–32 (2008).

89. Some courts focus on causation, treating the unlawful conduct as an obstacle the plaintiff must overcome in the prima facie case. *See id.* at 76–77 (citing *Shahbaz v. Horwitz*,

The case of *Peeler v. Hughes & Luce*<sup>90</sup> illustrates the harshness of the majority rule. In that case, Carol Peeler was accused of criminal tax fraud and represented by a partner in a prestigious firm. Facing the possibility of incarceration and losing custody over her minor children, Peeler entered a guilty plea.<sup>91</sup> Thereafter, Peeler sued her attorney for legal malpractice, asserting that the partner “failed to tell her that the United States Attorney had offered her absolute transactional immunity.”<sup>92</sup> In support of her negligence claim, Peeler relied on the affidavit of the prosecutor stating that he had offered immunity through her defense lawyer.<sup>93</sup> In response to the negligence claim, the firm filed a motion for summary judgment on the basis of the plea and conviction.<sup>94</sup> The Texas Supreme Court affirmed the trial court’s dismissal of the negligence claim because Peeler’s conviction was not overturned.<sup>95</sup> Joining with the majority of courts, the court held that “plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise.”<sup>96</sup> In reaching this conclusion, the court rejected the plaintiff’s claim that the lawyer’s misconduct deprived her of the opportunity to escape prosecution entirely because she was unaware of the immunity offer.<sup>97</sup>

In *Peeler*, the Supreme Court of Texas effectively declined to apply the “loss of chance” doctrine, under which a plaintiff should be compensated when a defendant’s tortious conduct “destroys or reduces a victim’s prospects for achieving a more favorable outcome.”<sup>98</sup> While some courts have applied the loss of chance doctrine in medical malpractice cases, lawyer-defendants in the United States have largely been successful in convincing courts that the doctrine should not extend to legal malpractice.<sup>99</sup>

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No. G037299, 2008 WL 808034, at \*9–10 (Cal. Ct. App. Mar. 27, 2008)). Others allow attorneys to use the unlawful conduct as a defense. *See id.* at 62–77. In both camps, the dicta in opinions commonly make public policy arguments for not allowing criminal wrongdoers to benefit. *See id.*

90. 909 S.W.2d 494 (Tex. 1995).

91. *See id.* at 498.

92. *See id.* at 496.

93. *See id.* at 498.

94. *See id.* at 496.

95. *Id.* at 498. As explained by the court, as a matter of law, it was the plaintiff’s “illegal conduct rather than the negligence of a convict’s counsel that is the cause in fact of any injuries flowing from the conviction, unless the conviction has been overturned.” *Id.*

96. *Id.* at 497–98.

97. *Id.* at 498 (“The lost opportunity of an admittedly guilty person to escape prosecution because of her lawyer’s negligence does not override the public policy against shifting the consequences of a crime to a third party.”).

98. Joseph H. King, Jr., “Reduction of Likelihood” Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. MEM. L. REV. 491, 492 (1998).

99. *See* Benjamin Lajoie, *Reopening the Discussion of the Loss of Opportunity Doctrine in New Hampshire: A Look at Decisions Made in Light of Current Times*, 13 U.N.H. L. REV. 99, 105 (2015) (noting that jurisdictions are “relatively evenly split on whether to hold doctors liable in situations where the doctor has deprived the patient of an opportunity for better outcome”). For a discussion of courts’ rejection of the doctrine in legal malpractice cases, see FORTNEY & JOHNSON, *supra* note 3, at 116–17. Professors Barton and Kessler

A court could entertain the loss of chance doctrine to mitigate the harshness of a strict “but for” test. For example, in *Vahila v. Hall*,<sup>100</sup> the Supreme Court of Ohio reversed a summary judgment in favor of the lawyer-defendant, concluding that it would be inequitable to always require plaintiffs to prove that they would have been successful in the underlying matter.<sup>101</sup> As stated by the court, a “strict ‘but for’ test also ignores settlement opportunities lost due to the attorney’s negligence.”<sup>102</sup> Despite the persuasive rationale for the loss of chance doctrine described in *Vahila*, scholars who have examined the viability of loss of chance doctrine in legal malpractice cases suggest that it is an uphill battle for plaintiffs because of the judicial bias in favor of the legal profession and captured regulators who craft and apply rules that protect lawyers.<sup>103</sup>

#### 5. Obstacles Caused by the Trial-Within-a-Trial Requirement Generally

Due to the trial-within-a-trial requirement, the lawyer-defendant defends her case by demonstrating that the plaintiff would not have prevailed in that underlying action. In attempting to destroy the plaintiff’s case, the lawyer-defendant may have the ability to use the plaintiff’s confidences to poke holes in the plaintiff’s case. While representing the plaintiff in the underlying action, the attorney likely learned about the weaknesses in the plaintiff’s case, obtaining confidential information from the plaintiff and others.<sup>104</sup> Once sued, the attorney may use those confidences against the plaintiff, turning the fiduciary relationship on its head.<sup>105</sup>

Moreover, the trial-within-a-trial requirement often makes the legal malpractice claim both complex and costly. In addition to presenting evidence to prove the lawyer-defendant’s malpractice, the plaintiff must call witnesses and offer other evidence to establish that the plaintiff would have prevailed in prosecuting or defending the underlying case.<sup>106</sup> This is especially difficult when the underlying case was never tried or when the passage of time makes admissible evidence unavailable.<sup>107</sup> From the standpoint of obtaining evidence, another complication may be obtaining

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point to courts’ refusals to apply loss of chance doctrine in legal malpractice cases as an example of captured regulators and judicial bias in favor of the legal profession. See Barton, *supra* note 12, at 494–96; Kessler, *supra* note 7, at 474–77.

100. 674 N.E.2d 1164 (Ohio 1997).

101. *Id.* at 1170 (concluding that such a requirement would be “unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim”).

102. *Id.* at 1169.

103. See Barton, *supra* note 12, at 494–96; Kessler, *supra* note 7, at 473–77.

104. See Barton, *supra* note 12, at 493 (stating that the “original attorney may know the facts, law, and weaknesses of the case backwards and forwards”).

105. See Koffler, *supra* note 80, at 75 (stating that “legal doctrine in this area surreptitiously mocks the fiduciary relationship of the attorney to the client”).

106. See *Developments in the Law—Lawyers’ Responsibilities and Lawyers’ Responses*, 107 HARV. L. REV. 1547, 1568 (1994).

107. *Id.* at 1568–69.



discovery from the defendant in the underlying case because the defendant is not a party in the legal malpractice case.<sup>108</sup>

The layers of complexity involved in having a trial within a trial also contribute to jury confusion.<sup>109</sup> To present the case to the jury in a way that they can understand, a plaintiff needs an experienced malpractice attorney. Ironically, veteran malpractice attorneys may be the hardest to convince to accept representation, precisely because they understand how procedural and substantive law protects defendants. This points to what one plaintiffs' attorney characterizes as the "biggest advantage" for defendants stemming from the trial-within-a-trial method: the "meritorious cases which are never filed because of the costs and complexities associated with litigating two cases."<sup>110</sup>

Finally, for both transactional- and litigation-based legal malpractice cases, it may not be enough for the plaintiff to establish by a preponderance of the evidence that the plaintiff would have prevailed. The majority of jurisdictions require that the plaintiff show that the underlying claim would have been collectable.<sup>111</sup> From the standpoint of a plaintiff who relied on the lawyer-defendant to screen and prosecute a claim, query whether it is fair to require the plaintiff to establish collectability to recover in the malpractice case. Absent some showing that the attorney warned that the underlying judgment might not be collectable, should the attorney be able to rely on collectability to escape liability for malpractice?<sup>112</sup>

#### D. Damages and Attorney's Fees

Scholars have argued that the treatment of damages, the final element of a negligence claim, in the context of legal malpractice claims also reflects a bias in favor of the legal profession.<sup>113</sup> As with other tort claims, legal malpractice plaintiffs must establish compensatory damages with reasonable certainty. What is different about legal malpractice cases is that certain types of damages are not available in these cases. Most notably, emotional distress damages generally are not recoverable in legal

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108. *See id.* at 1569; *see also* Jeffrie D. Boesen, Comment, *Shifting the Burden of Proof on Causation in Legal Malpractice Actions*, 1 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 308, 329 (2011).

109. *See* FORTNEY & JOHNSON, *supra* note 3, at 104–05.

110. Daniel L. Abrams, *When Case-Within-a-Case Method Helps Plaintiffs Prove Legal Malpractice*, N.Y. LEGAL ETHICS REP. (May 1, 2015), <http://www.newyorklegaethics.com/when-case-within-a-case-method-helps-plaintiffs-prove-legal-malpractice/> (suggesting that legal malpractice litigators must carefully consider their clients' positions in a trial within a trial) [<https://perma.cc/55NA-ZRYP>].

111. *See* Barton, *supra* note 12, at 492. Some jurisdictions treat the issues of collectability of a judgment as "a matter constituting avoidance or mitigation of damages," an issue that must be "pleaded and proved by the defendant as an affirmative defense." FORTNEY & JOHNSON, *supra* note 3, at 113.

112. *See* Barton, *supra* note 12, at 497 (arguing that the burden of proof on causation should be shifted to the defendant before the lawyer-defendant "accepted the employment and pursued the [underlying] case before it was allegedly lost through her incompetence").

113. *See, e.g.,* Kessler, *supra* note 7, at 477–91.

malpractice cases.<sup>114</sup> “Although the clients who have been victimized by negligent counsel may have lost their homes, the custody of their children, their freedom, or their life’s savings, in most jurisdictions, lawyers are immune from the common obligation to compensate for the emotional harm that they have caused.”<sup>115</sup>

Finally, the rules on recovery of attorney’s fees work to the disadvantage of legal malpractice plaintiffs. Generally speaking, plaintiffs will not be able to successfully recover the attorney’s fees associated with bringing the malpractice case. Specifically, in jurisdictions whose courts have taken the position that a legal malpractice claim sounds in tort, rather than contract, it will be difficult for a plaintiff to recover attorney’s fees incurred in pursuing claims against the lawyer-defendant, even if the state allows for recovery of attorney’s fees for breach of contract cases.

#### *E. Affirmative Defenses*

Assuming that a plaintiff successfully overcomes these obstacles and establishes the elements of the malpractice claim, the plaintiff must still deal with affirmative defenses, many of which favor defendants. With these affirmative defenses, a defendant can escape liability by establishing an independent reason why the plaintiff should not recover.<sup>116</sup> Although an exhaustive discussion of affirmative defenses is outside the scope of this Article, the following discussion outlines how certain defenses sweep broadly, shielding lawyer-tortfeasors.

An affirmative defense can be based on arbitration provisions in a retainer agreement.<sup>117</sup> Over the last two decades, lawyers have increasingly included arbitration provisions in their client agreements.<sup>118</sup> They feel more confident in doing so because a number of court and ethics opinions have condoned the use of binding arbitration provisions by attorneys.<sup>119</sup> Although a few courts have declined to enforce the provisions, the majority has enforced them, forcing clients to arbitrate fee disputes as well as legal malpractice claims.<sup>120</sup> Ethics opinions have also given lawyers a green

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114. See RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 20.11 (5th ed. 2000) (“With some jurisdictional exceptions, the rule is that damages for emotional injuries are not recoverable if they are a *consequence* of other damages caused by the attorney’s negligence.”).

115. Kessler, *supra* note 7, at 478. Professor Kessler argues that the following justifications for disallowing emotional distress damages are not persuasive: pain and suffering is not foreseeable, emotional harm is speculative, and limiting damages for emotional harm is not necessary “to insure representation for all.” *Id.* at 477–91.

116. See generally Rain Levy Minns-Fink, *Insuring a Civil Confession in Texas: Strategies for Alleging and Challenging Affirmative Defenses*, 37 *ADVOCATE* 57 (2006). For an overview of the most important affirmative defenses asserted by legal malpractice defendants, see FORTNEY & JOHNSON, *supra* note 3, at 291–357.

117. See FORTNEY & JOHNSON, *supra* note 3, at 354.

118. See Ashley Carleton, *An Ethics Analysis of Arbitrating Malpractice Claims*, 27 *J. AM. ACAD. MATRIM. L.* 445, 445 (2015).

119. *Id.* at 446–47.

120. See *id.* at 446, 456–60 (surveying the “change in tide” to accept arbitration provisions).

light to force aggrieved clients into arbitration, provided that the retainer agreement meets certain conditions, such as disclosure of the advantages and disadvantages of arbitration.<sup>121</sup>

From the standpoint of an aggrieved client, arbitration means that the client relinquishes the protections afforded by an open-court process, including right to discovery and appellate review.<sup>122</sup> Most importantly, the clients forfeit their right to a jury trial before their peers.<sup>123</sup> Even in jurisdictions that require that lawyers disclose the consequences of a prospective client agreeing to an arbitration provision, query whether most clients will object to the provisions. In particular, prospective clients of modest means may agree to those provisions, effectively forfeiting their access to courts when they want to pursue a legal malpractice claim. Clients may only fully appreciate the effect of the arbitration provision when they unsuccessfully attempt to hire a plaintiffs' attorney who declines representation due to the arbitration provision.<sup>124</sup>

Other affirmative defenses involve assignability and immunity. Due to public policy concerns, the majority of jurisdictions treat legal malpractice claims as not assignable; thus, the lawyer-defendant might be able to summarily defeat a plaintiff who has been assigned a legal malpractice claim.<sup>125</sup> Moreover, depending on the jurisdiction, the lawyer-defendant may be able to rely on the broad litigation privilege applicable to statements made in lawsuits<sup>126</sup> and the immunity available to certain groups of lawyers, such as public defenders.<sup>127</sup>

Even for plaintiffs who successfully get to the courthouse, other affirmative defenses can bar recovery. One relates to the unlawful conduct of the plaintiffs. As explained above, the unlawful conduct of the plaintiff may prevent the plaintiff from proving causation as part of the plaintiff's prima facie case.<sup>128</sup> In other jurisdictions, the defendant may assert the

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121. For a survey of ABA and state ethics opinions, see Chrissy L. Schwensen, *Arbitration Clauses in Fee Retainer Agreements*, 3 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 330, 341–43 (2013).

122. See Mark R. Trachtenbert & Christina F. Crozier, *Risky Business: Altering the Scope of Judicial Review of Arbitration Awards by Contract*, 69 TEX. B.J. 868, 868 (2006) (“Judicial review of an arbitration award is ‘extremely narrow’ and focuses on the integrity of the arbitration process, rather than the propriety of the result.”).

123. See FORTNEY & JOHNSON, *supra* note 3, at 354.

124. Unless the jurisdiction has addressed the enforceability of predispute arbitration provisions in attorney-client retainer agreements, a plaintiffs' attorney may be unwilling to file suit and face the motion to compel arbitration.

125. See Kevin Pennell, Note, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem*, 82 TEX. L. REV. 481, 481–82 (2003).

126. See Louise Lark Hill, *The Litigation Privilege: Its Place in Contemporary Jurisprudence*, 44 HOFSTRA L. REV. 401, 403 (2015) (explaining that some jurisdictions treat the litigation privilege as an affirmative defense and others as an immunity from civil action).

127. “Many states have granted public defenders qualified immunity from suit for acts or omissions made in the course of ‘executing their official duties,’ regardless of whether the attorney had been found ineffective.” Joseph H. Ricks, *Raising the Bar: Establishing an Effective Remedy Against Ineffective Counsel*, 2015 BYU L. REV. 1115, 1123.

128. See *supra* note 88 and accompanying text.

affirmative defense of *in pari delicto* or rely on the unlawful conduct or unclean hands doctrines.<sup>129</sup> Rather than allowing lawyer-defendants to escape liability by relying on *in pari delicto* or the unclean hands doctrine, Professor Vincent Johnson suggests that courts use a more equitable approach when a defendant asserts contributory negligence, comparative negligence, or comparative fault as an affirmative defense.<sup>130</sup>

### III. CHALLENGES IN OBTAINING RECOVERY

When malpractice plaintiffs overcome the hurdles discussed above and obtain judgments, they still may not be able to collect the judgment. Unless the lawyer carries insurance or possesses adequate nonexempt assets to cover the liability, the plaintiff may be left with an uncollectible judgment. This part briefly considers why uncollectability poses a serious risk for malpractice plaintiffs.

The risk boils down to the fact that only one state in the United States—Oregon—requires professional liability insurance for lawyers.<sup>131</sup> Unlike other countries, such as Canada and Australia, which require that lawyers maintain at least the minimum limits of liability, lawyers in the United States are largely free to practice without insurance.<sup>132</sup>

Although the precise percentage of uninsured lawyers is not known, the likelihood of being represented by an uninsured lawyer is significant.<sup>133</sup> This is especially true for clients represented by solo and small firm practitioners.<sup>134</sup> According to data reported in the 2016 registration process

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129. See Johnson, *supra* note 88, at 63–75.

130. *Id.* at 82. Among the “state appellate courts that have dealt with this issue in some fashion, the overwhelming majority have recognized that a client’s recovery for legal malpractice can be either entirely foreclosed, or proportionally diminished, as the result of his or her own negligence.” *Gorski v. Smith*, 812 A.2d 683, 698 (Pa. Super. Ct. 2002). For a discussion of the availability of contributory and comparative fault principles in defending legal malpractice cases, see Meyer & Eberspacher, *supra* note 6.

131. See Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 FLA. L. REV. (forthcoming 2017) (manuscript at 3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2735144](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735144) [<https://perma.cc/F9BA-CCBB>].

132. For a discussion of how the United States differs from other countries in not requiring insurance, see Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 FORDHAM URB. L.J. 177, 188–93 (2012). Depending on the practice circumstances, lawyers may opt to carry insurance as a condition to obtaining certain protections or benefits. For example, some bar associations require that lawyers carry minimum limits of liability to obtain referrals from the association’s referral network. See, e.g., *Find a Lawyer Referral Services (LRS)*, ST. B. CAL., <http://www.calbar.ca.gov/Public/LawyerReferralServicesLRS.aspx> (last visited Mar. 25, 2017) [<https://perma.cc/39DZ-5Z4F>].

133. Fortney, *supra* note 132, at 199 (referring to surveys that suggest that the percentages of uninsured attorneys range from 17 percent to 48 percent).

134. See Levin, *supra* note 131 (manuscript at 1 n.1) (citing survey findings indicating that 63 percent of Texas solo practitioners were uninsured and 62 percent of Utah solo practitioners were uninsured).

in Illinois, 41.1 percent of solo lawyers did not carry malpractice insurance.<sup>135</sup>

Lawyers in the United States do not carry insurance for a variety of reasons. First, lawyers commonly report that they do not carry insurance, because of its cost or their inability to afford it.<sup>136</sup> Other lawyers in private practice may not carry insurance because they practice on a part-time basis or practice with little or no profit.<sup>137</sup> Interestingly, some lawyers, such as criminal defense lawyers, have admitted that they do not carry insurance, because they are rarely sued or found liable for malpractice.<sup>138</sup> A perplexing explanation for lawyers “going bare” is that many apparently do not believe that they have a professional obligation to maintain insurance or assets to be available in the event of a claim.<sup>139</sup> Some of these lawyers may think that insurance “put[s] a target on [their] backs,” believing that they may not be sued if they do not carry insurance.<sup>140</sup>

When lawyers do carry professional liability insurance, another collectability risk relating to coverage limitations arises. Insurers use language in their insuring agreements, exclusions, and definitions to limit coverage. For example, to eliminate coverage for punitive damages, the insuring agreement may state that the insurer “agrees to pay on behalf of the Insured all sums in excess of the deductible that the Insured shall become legally obligated to pay as damages.”<sup>141</sup> One must read the definitions to learn that “damages” does not include “punitive or exemplary amounts.”<sup>142</sup>

Common coverage exclusions eliminate coverage for fraud, intentional acts, and business transactions with clients.<sup>143</sup> Over the last twenty years, insurers have added new exclusions and policy language to limit their exposure. For example, insurers revised policy language to limit liability for claims relating to legal services performed when the insured was a lawyer at a prior law firm.<sup>144</sup> Unless the lateral lawyer has insurance under

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135. Email from James J. Grogan, Deputy Adm’r & Chief Counsel, Att’y Registration & Disciplinary Comm’n of the Supreme Court of Ill., to author (Sept. 27, 2016) (on file with the *Fordham Law Review*).

136. See Levin, *supra* note 131 (manuscript at 9–11) (referring to survey results in which uninsured lawyers in three states frequently cited “cost” and unaffordability as reasons for not carrying insurance). In the three states, the annual premium for minimum levels of coverage runs about \$3,000 per lawyer. *Id.* at 9.

137. *Id.* at 10, 12.

138. *Id.* at 13 (indicating that 43 percent of New Mexico lawyers indicated their practice areas did not expose them personally to malpractice liability).

139. See Fortney, *supra* note 132, at 206–09 (analyzing hearing testimony and written comments submitted in connection with the Texas debate over requiring attorneys to disclose whether they carried insurance).

140. *Id.* at 207 n.167.

141. Sample CNA Lawyers’ Professional Liability Insurance Policy, N.Y. ST. B. INS. PROGRAM WITH USI AFFINITY 1, [http://www.mybarinsurance.com/Content/Downloadables/CNA\\_Sample\\_Policy.pdf](http://www.mybarinsurance.com/Content/Downloadables/CNA_Sample_Policy.pdf) (last visited Mar. 25, 2017) [<https://perma.cc/Q89M-HRXZ>].

142. *Id.* at 4–5.

143. For an overview of common exclusions, see RONALD E. MALLEN, LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE (2016).

144. See Susan Saab Fortney, *Insurance Issues Related to Lateral Hire Musical Chairs*, 2000 J. PROF. LAW. (SYMP. ISSUE) 65, 67–68 (noting that insurers tightened policy language

a prior firm's policy or the lawyer maintained personal assets to pay a judgment, an injured person may be left without recovery.

From the standpoint of accountability and financial responsibility, perhaps the most troubling conduct that impacts malpractice victims is that some lawyers may intentionally "make their pockets shallow" by sheltering assets and forgoing insurance.<sup>145</sup> Although others in business may resort to such conduct to minimize their liability exposure, lawyers "who espouse the status of law as a profession should recognize financial responsibility as a professional virtue and promote it as such."<sup>146</sup>

#### IV. INITIATIVES TO PROVIDE MORE ACCESS TO MALPRACTICE VICTIMS

The above survey of challenges faced by malpractice plaintiffs paints an arduous, but accurate, picture of the journey, starting with hiring a malpractice lawyer to collecting a judgment. The discussion of the uphill battle for plaintiffs may help regulators, jurists, and concerned lawyers better appreciate the unfairness of the status quo and rethink current approaches. This part identifies changes and initiatives designed to provide more access to justice for victims of legal malpractice, especially those of modest means.

In considering changes, a starting point is to rethink the standards and procedures used in professional liability cases against lawyers. This examination requires consideration of rules and legal principles that apply to elements of a legal malpractice case, including the strict application of a privity rule in some jurisdictions.<sup>147</sup>

Another concern relates to the proof of causation and the trial-within-a-trial requirement. Depending on the alleged misconduct, the plaintiff should not be limited to a "but for" showing. As with medical malpractice cases in some jurisdictions, plaintiffs should be allowed to rely on the loss of chance doctrine and on the relaxed "substantial factor" test as permitted in some breach of fiduciary duty cases. For claims against criminal defense lawyers, more high courts should join the handful of jurisdictions that recognize the inequity of requiring a plaintiff to establish actual innocence or obtain postconviction relief.

Implementing changes related to experts can also provide more access to malpractice victims, especially those whose claims for damages are less than six figures. Because expert witness fees make smaller legal malpractice cases cost prohibitive, judges should carefully consider whether expert testimony is necessary. Currently, the category of cases in which expert testimony is unnecessary is very narrow. It is largely limited to situations when the common knowledge of jurors is extensive enough to

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to clarify that a new firm's policy did not cover claims brought in connection with professional services rendered at another firm).

145. Levin, *supra* note 131 (manuscript at 36) (suggesting that "[c]lients will likely feel doubly aggrieved when the uninsured lawyer shelters assets").

146. Fortney, *supra* note 132, at 214.

147. See *supra* notes 67–68 and accompanying text.

enable them to discern the attorney's misconduct from the facts.<sup>148</sup> In the interest of allowing more malpractice victims to pursue claims, judges should scrutinize situations to determine if expert testimony is necessary to assist the trier of fact. In bench trials, judges may be able to take judicial notice of standards of care under certain circumstances. In other cases, judges should not grant summary judgment or directed verdicts on the basis of no expert testimony. Rather, judges could allow more cases to go forward without experts, leaving the question of the necessity of an expert to be evaluated on appeal.

Another alternative to the expensive battle of experts is for parties to mutually agree to share the same expert. Occasionally, malpractice insurers suggest this approach in situations such as ones where the parties recognize that the liability question turns on the reasonableness of the defendant's conduct.

A related move would be for the court to appoint experts under the authority of Federal Rule of Evidence 706 or state versions of that rule.<sup>149</sup> The use of court-appointed experts changes the economics of a case because courts may obligate parties to split the expert fees and expenses.<sup>150</sup>

Costs associated with the legal malpractice cases might also be cut if courts provided more latitude to experts. For example, allowing more experts to testify on the basis of hypothetical scenarios could reduce the amount of time that experts must devote to preparing for depositions and trial.

On the issue of causation, some jurisdictions shift the burden of proof to the lawyer-defendant.<sup>151</sup> More courts should be willing to shift the burden in situations such as ones where the plaintiff will not be able to prove the merits of underlying claims, because the alleged malpractice related to the failure of the defendant to discover evidence.<sup>152</sup>

In addition to shifting burdens and cutting costs, the attractiveness of a legal malpractice claim would also be impacted if courts changed rules currently applied to damages and attorney's fees. Specifically, courts

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148. See FORTNEY & JOHNSON, *supra* note 3, at 77.

149. See FED. R. EVID. 706(a) ("On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.").

150. In most civil cases, the compensation is payable "by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs." *Id.* 706(c)(2).

151. See Boysen, *supra* note 108, at 311 (referring to a "significant minority of jurisdictions [that] allow the burden to shift to the defendant after the plaintiff presents a prima facie case of negligence").

152. See F. Parks Brown, Case Note, *Evidentiary Standards in the Legal Malpractice Trial-Within-a-Trial*, 3 ST. MARY'S LEGAL MALPRACTICE & ETHICS 320, 326–27 (2013) ("The justification for shifting the burden of proof on causation to the attorney, requiring the attorney prove his negligence was not the proximate cause of the plaintiff's injury, is based upon the superior position that the defendant-attorney occupies in relation to his former client who has now brought charges against him.").

should be more willing to allow plaintiffs to recover emotional distress damages. In addition, courts could allow more use of fee forfeiture as a remedy. Beyond providing compensation to the individual plaintiff, recognition of different types of damages and equitable remedies “stimulates others to seek legal remedies for their injuries.”<sup>153</sup>

Regulators and bar associations could also take steps to improve the likelihood of a plaintiff being able to collect judgments. Progressive jurisdictions could join Oregon and countries around the world in requiring malpractice insurance for attorneys in private practice. Short of requiring insurance or requiring lawyers to demonstrate that they have sufficient nonexempt assets to pay malpractice judgments, states should require lawyers to disclose directly to clients the fact that the lawyer does not maintain insurance.<sup>154</sup> Data suggest that rigorous disclosure requirements may help reduce the number of uninsured lawyers.<sup>155</sup>

For those situations where lawyers have engaged in serious misconduct that is not covered by malpractice insurance, injured persons should be able to submit claims to the state’s client protection funds.<sup>156</sup> Where possible, bar associations and state supreme courts should evaluate the conditions and caps set forth in program guidelines.

Even with these changes, pursuing a legal malpractice claim through the courts may not be feasible for many consumers with relatively small claims for damages. In situations where the alleged misconduct violates state disciplinary rules, the disciplinary system may be able to provide a forum for resolving disputes. Although disciplinary authorities in the United States may order restitution in limited circumstances, regulators abroad are using approaches to provide more redress to consumers. For example, a new regulatory scheme in Victoria, Australia, empowers the legal services commissioner to order compensation up to \$25,000 to resolve consumer complaints, such as ones involving losses because of poor service.<sup>157</sup> In England and Wales, a legal ombudsman functions as an independent body charged with resolving disputes between lawyers and solicitors.<sup>158</sup> Interestingly, the legal ombudsman follows a process that includes features of mediation and arbitration. First, the legal ombudsman attempts to resolve informally the dispute between the consumer and the solicitor.<sup>159</sup> If the parties cannot resolve the dispute, the disagreement goes back to the

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153. Kessler, *supra* note 7, at 461.

154. See Levin, *supra* note 131 (manuscript at 48–50) (proposing written disclosure rules that provide meaningful information to the public before a client decides to retain the attorney).

155. See *id.* at 24.

156. See Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justification for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J., 429, 473 n.199 (2001) (referring to the limitations and conditions for payment).

157. *Legal Profession Uniform Law Application Act 2014* (Vict.) s 308 (Austl.).

158. Legal Services Act 2007, c. 29, § 114 (UK). The regulatory objectives of the Legal Services Act include “improving access to justice.” *Id.* § 1.

159. See FAQs: *How We Resolve Complaints*, LEGAL OMBUDSMAN, <http://www.legalombudsman.org.uk/faqs/> (last visited Mar. 25, 2017) [<https://perma.cc/G4RV-6ZBG>].



legal ombudsman for a decision.<sup>160</sup> When the legal ombudsman finds in favor of a complainant, the ombudsman can require the solicitor to pay up to £50,000, although the average compensation award is under £250.<sup>161</sup> Progressive courts, regulators, and bar associations in the United States should study the Australian and U.K. experiences to determine if features of their systems could be adapted to resolve disputes and provide redress to injured consumers.

#### CONCLUSION

In 1976, a federal judge wrote: “The time has come for lawyers to be responsible for their mistakes and their lack of attention to their professional responsibilities.”<sup>162</sup> Forty years later, it is time to reexamine whether our civil liability regime provides meaningful remedies to numerous consumers injured by attorney misconduct. Jurists and other decision makers who recognize the full scope of challenges faced by malpractice plaintiffs should be less inclined to extend additional protections to attorneys and may even support changes that better balance the interests of lawyers and those they injure. Most importantly, lawyers who advocate access to justice and professionalism should be the first to support developments that provide avenues for holding lawyers accountable for their professional misdeeds.

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160. *Id.*

161. Decisions made by the legal ombudsman are subject to judicial review. *Id.*

162. *Brown v. E.W. Bliss Co.*, 72 F.R.D. 198, 200 (D. Md. 1976).